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NO. 91-337

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JOE TISDALE, ET AL.,

APPELLEES,

VS.

ROBERT J. SHEHEEN, SPEAKER OF THE HOUSE AND REPRESENTATIVES IN HIS OFFICIAL CAPACITY AND AS REPRESENTATIVE OF THE MEMBERSHIP OF THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES,

APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA (THREE-JUDGE COURT)

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

When the House of Representatives (S.C.) adopts a rule which expels a member in contravention of the procedures outlined by the Constitution of the State of South Carolina and which sets forth by rule an additional qualification for active service in office is that not a "change" subject to preclearance under the Voting Rights Act of 1965 42 U.S.C. 1973 c?

PARTIES

APPELLANT

Robert J. Sheheen, Speaker of the South Carolina House of Representatives

APPELLEES

Joe Tisdale, Veronica Cooper, John Wesley Adamson, Lizzie R. Brown, Joseph Gordon, Jacques C. Gordon, Arthur Tisdale, Jr., and B. J. Gordon, Jr.,

AMICUS CURIAE

United States Department of Justice, Civil Rights Division

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TABLE OF AUTHORITIES

CASES:

Gregory v. Ashcroft,
_____ U.S. _____,
111 S.Ct 2395 (1991) 5

Powell v. McCormack,
395 U.S. 486 (1968)
5

PARLIAMENTARY AUTHORITY:

Deschler's Precedents,
"Conduct or Discipline"
§15.2 & 15.2, U.S.G.P.O.
(1981) 4

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

SOUTH CAROLINA CONSTITUTION, (1895, 1973)

ARTICLE VI §8

Suspension and prosecution of officers accused of crime.

Whenever it appears to the satisfaction of the Governor that probable cause exists to charge any officer of the State or its political subdivisions who has the custody of the public or trust funds with embezzlement or the appropriation of public or trust funds to private use, then the Governor shall direct his immediate prosecution by the proper officer, and upon such indictment if permitted by law, the Governor shall suspend such officer and appoint one in his stead, until he shall have been acquitted. In case of conviction, the position shall be declared vacant and the vacancy filled as may be provided by law.

Any officer of the State or its political subdivisions, except members and officers of the Legislative and Judicial Branches, who has been indicted by a grand jury for a crime involving moral turpitude or who has waived such indictment if permitted by law may be suspended by the Governor until he shall have been acquitted. In

declared vacant and the vacancy filled as may be provided by law. (1972 (57) 3181; 1973 (58) 83.)

RULES OF THE HOUSE OF REPRESENTATIVES
R. 3.9

3.9 If any member shall be absent without leave and a quorum is not present, the Speaker shall instruct the Sergeant at Arms or appoint other authorized persons to send for such member or members and take them into custody. The outer doors to the Chamber shall be closed. The Speaker shall order that security personnel shall be posted at the outer doors of the Chamber and no member shall be permitted to leave the second floor of the State House without written leave of the Speaker. The Speaker may also order that security personnel be posted at all entrances to the State House to prevent members from leaving without authorization. An absent member who is taken into custody after the invocation of this rule shall pay for all reasonable expenses incurred, which shall include mileage at the prevailing rate for state employees and a ten dollar custody fee. In addition, such absent member who is taken into custody shall forfeit his entitlement to subsistence and mileage for that legislative day and shall be subject to any additional penalties the House deems necessary. Should a quorum be present and ten members request, such absent member or members shall be sent for as herein provided and subjected to the same penalties. The Speaker shall

strictly enforce the provisions of this rule. Provided, however, in the case of a member not being present when Rule 3.9 is invoked and such member voluntarily returns without being taken into custody, he shall not be subject to the penalties of this section.

STATEMENT OF CASE

The Appellees filed a lawsuit on March 22, 1991, within ten days of the conclusion of the jury trial of Rep. Gordon. Rep. Gordon had, prior to the return of the jury verdict, been twice "suspended" from office by the Speaker under the challenged rule. He was first suspended on September 21, 1990, and secondly suspended on November 13, 1990, immediately after his reelection to office.

The lawsuit, which is the subject of this appeal, was filed when the state election machinery was triggered by letter of the the Speaker dated March 11, 1991, which expelled Rep. Gordon. Filing for office was to begin on March 29, 1991. An injunction was denied by the single judge on March

29 and filing occurred. An election has since taken place and a new member seated for the District.

Plaintiffs in the lawsuit plead their disenfranchisement under the suspension and the unconstitutionality of the House action in the suspension/expulsion as well as the violation of the Voting Rights Act.

The three judge panel heard this case on argument of law, the facts are undisputed. The case was correctly decided by the three judge panel in favor of Appellees on May 29, 1991.

ARGUMENT

Appellants persist in referring to House Rule 3.12 as an "internal" rule not subject to preclearance under principles of comity, the Tenth Amendment, and a "parade of horribles" flowing from the requirement of Section 5 preclearance.

First, it is not an "internal" rule. It does not prescribe the manner in which the House will conduct its business. It is an external rule, the only one in the Rules of the S. C. House of Representatives. This rule says that if a district elects someone who is later accused of a crime by indictment the District will be denied representation by suspension of the officeholder. The debate of the Congress's Committee on the Judiciary as

published in Deschler's at §15.2 and 15.3 eloquently sets forth the principle that a legislative body may discipline its members but it goes too far when it strips his constituents of representation. Suspension denies representation while simultaneously preventing a new election to obtain a representative - the worst possible situation for a constituency.

Appellants have argued that the officeholder in this situation should resign. This is chimerical thinking. An indictment is an accusation and a person is presumed innocent until found guilty. A person who maintains his innocence should not be penalized, nor should those he represents be penalized, whether the determination is guilty or innocent. This rule exacts a penalty from both officeholder and constituents

prior to any determination on the charges by pleading or judgment.

This rule is clearly an addition to "qualifications" for holding office which is therefore subject to the Voting Rights Act and was so held by the Three Judge Panel. It further violates the State and Federal Constitutions under the principles articulated in Powell v. McCormack, 395, U.S. 486 (1986), a question the Panel refused to determine when it founded its opinion on the Voting Rights Act.

Appellants argue that under Gregory v. Ashcroft, ____ U.S.____, 111 S. Ct. 2395 (1991), the Tenth Amendment prohibits a federal court from ruling on this matter. They argue that the power to discipline its membership is solely and exclusively the House's. Appellees have not in argument or briefing

disputed this principle of inherent parliamentary power, though they are not herein conceding this is a matter within the purview of the Tenth Amendment. Appellees argue that House Rule 3.12 is not discipline of members, it is punishment of constituents and that it violates the State Constitution in working a change in Article III §12, without following the provisions for changing our State Constitution. In oral argument before the lower Court the Speaker himself admitted that "suspension" was a change of our state Constitution but argued that the expulsion was an articulation of other sections of our state Constitution. The House Rules adopt a procedure outlined in Article VI §8, of our state Constitution which is by its express terms not applicable beyond the

Executive branch of government for good policy reasons. There are no "vice" legislators or "assistant" judges. Suspension voids the office unlike the executive branch which is designed to operate with assistants, deputies, and vice officers.

The rule punishes constituents rather than disciplining members because it disenfranchises the constituents. It prohibits the constituents from having their elected representative while he is suspended where expulsion would create a vacancy to be filled. The rule then expels the member without a two-thirds vote of the House, creating a vacancy based purely on the receipt of information from an external, independent branch of government. If the indictment of Gordon had occurred in Florida it would not likely have been

known to the Speaker and he would not therefore have suspended or expelled Gordon. Further, no law requires reporting of these events to the Speaker, it is only through the news media that he knows to execute the provisions of these rules.

Finally, Appellees contend that the inherent power to discipline members lies with the House and can not be delegated to the Speaker as a ministerial function, the second flaw in the rule. The rule should be analyzed as an inappropriate delegation. The appellees recognize the inherent power of a parliamentary body to control its membership. But even the Speaker cannot, without a vote of the membership send for the absent, excused members. It is the right of the House to compel attendance. How then can he without a

vote of the membership expel or suspend a member? This is the fundamental flaw in Appellant's reasoning -- it is a profound change of parliamentary practice and of our State Constitution to "delegate" as a ministerial function the suspension and expulsion of a member.

This rule is a change subject to the Voting Rights Act as it adds qualifications for holding office and sets up new procedures for expulsion not provided for in our State Constitution.

CONCLUSION

For the foregoing reasons the decision of the Three Judge Panel should be affirmed.

Respectfully submitted.

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September 21, 1990

Mr. B. J. Gordon, Jr.
Box 751
Kingstree, SC 29556

Dear B.J.:

I have received today a copy of an indictment issued in the U. S. District Court for South Carolina. Regretfully, in accord with Rule 3.12, I am required to suspend you from your official duties as a member of the South Carolina House of Representatives.

In accord with the impact of that Rule the suspension will cancel your privileges of your offices in the Blatt Building; suspend the telephone credit card issued to you; suspend your access to your state centrex telephone system; and suspend all payments from the House Funds.

I look forward to the favorable resolution of this indictment whereupon your privileges will be reinstated.

Sincerely,
s/
Robert J. Sheheen

November 13, 1990

Mr. B. J. Gordon, Jr.
Box 751
Kingstree, SC 29556

Dear B.J.:

In accordance with House Rule 3.12, I am required to suspend you from your official duties as a member of the South Carolina House of Representatives. While you have been previously notified of your suspension, the commencement of a new term of office resulting from your re-election November 6, required re-suspension until the final conclusion of the indictment issued in U. S. District Court.

All privileges of office previously suspended continue to be suspended. I look forward to the favorable resolution of the indictment whereupon your privileges will be reinstated.

Sincerely,
s/
Robert J. Sheheen

March 11, 1991

Rev. B. J. Gordon, Jr.
Box 751
Kingstree, SC 29556

Dear B. J.:

I have received today a copy of the jury verdict issued in the U. S. District Court of South Carolina criminal case of United States of America v. Benjamin J. Gordon, Jr., Docket No. 3:90-434.

Based upon the two convictions contained in that verdict and in accord with House Rule 3.12, I must regretfully declare the House District No. 101 seat vacant. Accordingly, all privileges of office, including those previously suspended upon your indictment, are now terminated.

Sincerely.
s/
Robert J. Sheheen

March 12, 1991

Lionel S. Lofton, Esquire
174 East Bay Street
Post Office Box 449
Charleston, SC 29402

Dear Mr. Lofton:

I am writing in reply to your letter dated March 11, 1991, in which you requested that I hold in abeyance the expulsion of Rep. B. J. Gordon after his conviction in Federal Court. House Rules do not allow such a delay.

I am required under House Rule 3.12 to declare a member's seat vacant upon his conviction and under State law to issue a writ of election to fill the vacancy. In the event that Mr. Gordon is successful in having the convictions set aside, however, I will declare the writ of election void and reinstate Mr. Gordon to his former House seat. I hope this assurance is satisfactory to you and your client.

Sincerely,
s/
Robert J. Sheheen